

Office of Chief Counsel
Internal Revenue Service

memorandum

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to: Buzz Mroszak, Technical Coordinator, North Central District
Attn: Marcy Defiel, Chief, Examination Support and Processing
North Central District

from: District Counsel, North Central District, St. Paul

subject: Request for Advisory Opinion re Interest Rate on Refund to Employer
of Employee Portion of Social Security Tax on Wages

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This memorandum is in response to the request for advice submitted July 20, 2000.

ISSUES

Whether the interest, due on a refund of the employee portion of social security taxes on wages submitted by the corporate employer on behalf of individual employees using the consent procedure, should be calculated under I.R.C. §6621(a) using the rate for individuals or the rate for corporations.

CONCLUSION

The refund interest should be calculated using the rate for individuals.

DISCUSSION

In this case, a corporate employer had individual employees for the tax years involved, paid the employer portion of the social security tax, withheld the employee portion of the social security tax from the employees' wages, and paid the employee portion of the social security tax. The employer overpaid both the employer and employee portions of the social security tax. The employer received written consent from a number of employees to claim refunds for their portion of the social security tax. The employer submitted a claim for refund for the employer portion of the social security tax and for the employee portion of the social security tax for the employees from whom consents had been obtained. The refunds were allowed. The interest on the refunds for both the employer and employee portions of the social security tax was calculated using the interest rate for corporations under I.R.C. §6621. The employer claims that the interest on the refund for the employee portion of the social security tax should have been calculated using the rate for individuals under I.R.C. §6621.

The employer is authorized to obtain a refund for overpayment of the employee portion of the social security tax withheld by the employer and paid by the employer. See, Reg. §31.6402(a)-2. (One circumstance under which the employer is authorized to obtain a refund for overpayment of the employee portion of the social security tax is where the employer obtains a consent from the employee. Reg. §31.6402(a)-2(a)(2)(i).) Indeed, the employer may be required to seek a refund for overpayment of the employee portion of the social security tax before it can receive a refund for overpayment of the employer portion of the social security tax. Atlantic Department Stores, Inc. v. United States, 557 F.2d 957 (2d. Cir. 1977); Macy's New York, Inc. v. United States, 484 F.Supp. 181 (S.D.N.Y. 1980).

I.R.C. §6621(a)(1) provides the interest rates for refunds. A higher interest rate is provided for individuals under I.R.C. §6621(a)(1)(A) than for corporations under I.R.C. §6621(a)(1)(B).

Where the employer obtains a refund for overpayment of the employee portion of the social security tax, it does so on behalf of the employee. The liability for the employee portion of the social security tax is on the employee. I.R.C. §3101. The employer through withholding merely 'collects' the tax liability of the employee. I.R.C. §3102. Amounts withheld from the employee wages for the employee portion of the social security tax are treated as paid to the employee and repaid by the employee through withholding to satisfy the employee portion of the social security tax. I.R.C. §3123. The employee portion of

the social security tax may be collected directly from the employee. Reg. §31.3102-1(c). Amounts received by the employer as a refund for overpayment of the employee portion of the social security tax must be paid over to the employee. Reg. §31.6413(a)-1(b).

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